In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4059

In the Matter of PATTERSON-MACDONALD SHIPBUILDING COMPANY, a corporation, Bankrupt;

THOMAS CARSTENS and STACIE C. CARSTENS, his wife, *Appellants*

vs.

JOHN L. McLEAN, as Trustee in Bankruptcy of PATTERSON-MACDONALD SHIPBUILDING COMPANY, a corporation, Bankrupt, *Appellee*

APPELLANTS' OPENING BRIEF

KERR, McCORD & IVEY, and WM. Z. KERR

ATTORNEYS FOR APPELLANTS

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STATEMENT OF THE CASE

On November 1, 1917, the appellants, Thomas Carstens and Stacie C. Carstens, his wife, were the owners of a tract of approximately twenty-five acres of land situated on the Duwamish Commercial

Waterway in King County, Washington, suitable for a shipbuilding plant. At that time a written lease was executed by the appellants and the Patterson-MacDonald Shipbuilding Company, a corporation, for a term of five years from June 1, 1917, at an annual rental of $5,000 payable monthly in advance during the said term and in addition to the said rental the lessee agreed to pay the annual taxes on the property commencing with those falling due after the date of the lease.

The Patterson-MacDonald Shipbuilding Company entered into possession of the property, constructed their plant, and paid the rent stipulated in the lease up to and including the month of March, 1920, at which time the company was adjudged a bankrupt. John L. McLean, the appellee, was elected and qualified as trustee in bankruptcy. He continued in possession of the premises until July 1, 1921, making the monthly cash payments required by the lease under the order of the referee, but he made no payment of the annual taxes.

At the time of the surrender of the premises by the appellee to the owners a question arose as to what portion of the taxes required by the lease to be paid by the bankrupt, should be paid by the trustee. The appellants claimed that the trustee should

pay all of the 1919, 1920 and six-twelfths of the 1921 taxes. The trustee claimed that he should not pay any of the 1919 taxes. As to the 1920 and six-twelfths of the 1921 taxes, the trustee claimed that the term taxes should exclude the assessment for Commercial Waterway in any event.

After the bankruptcy within the year for the filing of claims the appellants made a demand on the trustee by letter for the payment of the 1919 taxes. (Exhibit "A," p. 12 Trans.) They consulted their attorney as to what should be done to insure them the payments required in the lease and he advised them that if the trustee remained in possession, paying the amounts called for in the lease, that that would amount to a ratification and acceptance of the lease *cum onere* as an asset of the estate, requiring the trustee to pay the 1919 tax.

Acting upon this advise and upon the continued payments of the monthly rental no claim was filed for the 1919 taxes other than the informal demand in the letter of August 28, 1923, Exhibit "A."

Upon appropriate petition, answer and reply after evidence had been heard, the referee made an order that the "lease was not accepted or adopted

by the trustee . . . as an asset" of the estate. (Trans. p. 15.) The reasonable rental was fixed for the period of occupancy by the trustee and the referee further ordered that the petition for leave to file claim for the taxes for the year 1919 be denied. (Trans. p. 15.)

The appellants sought a review by the District Court of the portion of the order denying leave to file an amended claim but acquiesced in the amount awarded as a reasonable value of the use of the premises during the trustee's possession.

Upon agreed facts (Trans. p. 17) the District Court sustained the referee's order. (Trans. pp. 35-36.) This appeal followed.

The question involved is whether or not the appellants, after the year for filing claims has expired can be permitted to file an amended claim to the letter of August 28, 1921. If not, can the claim be filed within sixty days after the liquidation of the obligations incidental to the lease.

ASSIGNMENT OF ERRORS

The decree of the District Court is erroneous and unjust to the appellants in that: (Trans. p. 38)

I

It fails to allow the petitioners a claim against the estate of Patterson-MacDonald Shipbuilding Company, a corporation, bankrupt, in the sum of $7,928.32, with interest.

II

It fails to permit the petitioners to file a formal claim as an amended claim to a letter of August 20, 1920, addressed and delivered to the trustee of the said bankrupt.

III

The said decree fails to permit the petitioners to treat the said letter of August 20, 1920, from the petitioners to the said trustee, as an informal claim, capable of being amended by petitioners under section 57 of the Bankruptcy Act of 1898, as amended.

IV

The said decree fails to permit the petitioner to file formal proof of claim within (60) sixty days

after the determination of the amount due from the trustee for possession of the property held by the bankrupt under lease from petitioners, to-wit: within (60) sixty days from November 14, 1922, made by the Honorable C. R. Hawkins, referee in bankruptcy, before whom the said proceedings were heard.

ARGUMENT

Section 57a of the Bankruptcy Act of 1898 provides:

"Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what securities are held therefor, and whether any, and, if so what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

Section 57n provides:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, and then within sixty days after the rendition of such judgment: Provided, That the rights of infants and insane persons without guardians, with-

out notice of the proceedings, may continue six months longer."

General orders of the supreme court, No. 21, provides the form of the deposition approved for the filing of claims.

The letter relied upon by the appellants as an informal claim (Exhibit "A," Trans. p. 12), is as follows:

"Aug. 28, 1920.

"Mr. J. L. McLean, Trustee,
Patterson-MacDonald Shipbuilding Co.,
Seattle, Washington.
Ref. Thos. Carstens' Lease.

"Dear sir:

"We had occasion to enquire relative to the real estate taxes for the year 1919, and find that the King County treasurer's record show that these taxes have not been taken care of by the Patterson-MacDonald Shipbuilding Company for any portion of the 1919 taxes.

"We find that the taxes on part of Government Lot 4 west of East Marginal Way amount to $7,-619.69. The taxes on portion of Government Lot 3, west of East Marginal Way amounts to $308.63.

"As one-half of the above amounts was not paid previous to May 31st, the full amount is now drawing interest at 12% per annum, which at the present writing would add about 3% to the amount of taxes.

"The treasurer's records show that tax statements were sent to Patterson-MacDonald Shipbuilding Company, as they have done in former years, and no doubt they were received. However, we secured new statements and are forwarding these herewith for your prompt attention.

"We trust that you will advise us within the next few days that these taxes have been taken care of, as we can not permit this matter to go delinquent any longer.

Yours very truly,

CARSTENS PACKIN GCOMPANY,

By O. F. KUKL,
Secretary-Treasurer."

OFK:ES

The letter fails to comply with the statute or the general orders as a proof of claim in the following respects:

(1) It was not filed with the referee within one year of the adjudication of bankruptcy.

(2) It is not under oath.

(3) It is not signed by the creditor, nor does it state why an agent signs.

(4) It does not show what if any security is held.

(5) It does not give the title of the court or cause.

The letter complies with the statute in the following respects:

(6) It is in writing.

(7) It sets out the claim.

(8) It sets for the consideration.

(9) It states that no payment has been made.

(10) It clamis that the amount is justly owing.

A claim presented within the year, though fatally defective, may be amended after the year for filing claims that have expired.

In *Hutchinson v. Otis,* the Circuit Court of Appeals for the First Circuit, 115 Fed. 937, passing upon the right to file an amended claim after the year had elapsed, used the following language:

"Within the year limited by the statute for proof of claim in bankruptcy, Otis, Wilcox & Company filed a proof which failed in every substantial particular, to comply with the general orders of the supreme court with reference to such matters. Subsequently, after the expxiration of the year, they filed a substituted proof of claim, alleged to be secured, in part, by that portion of the proceeds of the sale of the bankrupt in the New York stock exchange which had been paid over to the trustee. . . . . We now come to the appeal. The only ground to which it can relate is the objection to the sub-

stituted proof because it was not filed within the year limited by the terms of the statute. This, however, is easily disposed of. The courts of bankruptcy, like the courts of admiralty, permit amendment with the most liberal hand, and as there was enough in the original proof by which to amend, and as the District Court thought it was equitable to allow the amendment, the appeal can not be maintained."

This case was appealed to the supreme court, where Justice Holmes in *Hutchinson v. Otis, Wilcox & Company*, 190 U. S. 552, 23 S. C. Rep. 778, said:

"The proof of debt originally filed is admitted to have been defective. A substituted proof was filed by consent of the trustee, more than a year after the adjudication, the facts having been agreed in the meantime, and an appeal taken. It is argued that the allowance of the amendment is within section 57n, forbidding proof subsequent to one year after the adjudication, etc. The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proved. The clause relied upon can not be taken to exclude amendments. An example similar in principle is the allowance of an amendment setting up the same cause of action after the statute of limitations has run, when the original declaration was bad."

Great liberality has existed since this decision in the matter of amendment of defective claims.

(1) *Necessity of Filing with Referee Within Year.*

The letter was presented to the trustee in August, 1920. The adjudication of bankruptcy was in March, 1920. It was therefore sufficiently filed within the year.

> *Orcutt Company v. Green*, 204 U. S. 96, 51 L. Ed. 390, 27 S. C. R. 195.

"Where a claim is duly presented to the trustee within the year, it is sufficient compliance with the requirements of the statute, although not delivered to the referee until after that time."

> Collier, Bankruptcy, Twelfth Edition, page 820.
>
> 2 Remington, Bankruptcy, Sec. 881.

(2) *Necessity of Claim Being Under Oath.*

There are many cases where the oath has been defective or no oath attached to an informal claim where amendment was allowed almost as of course.

> *In re Patterson - MacDonald Shipbuilding Co.*, 288 Fed. 546.
>
> *In re Stevens*, 107 Fed. 243.

In re Roeber, 127 Fed. 122, the Circuit Court of Appeals of the Second Circuit considered a situa-

tion where sixteen months after the adjudication a creditor sought to amend a claim that had not been sworn to. The court said in part:

"In the course of the proceedings, and on March 2, 1902 (within the year), there was filed in the District Court a document inartifically drawn if considered as a 'proof of claim,' but which contained averments that there was due and owing to Louis Bossert and Son the sum of $2,985.13 for materials furnished to the bankrupt in the erection of a building for said Leiser, and that the certain sum of money then paid by Leiser into court was security therefor. This document was signed by the attorney for Louis Bossart and Son, but was not sworn to. It contains similar averments as to the Otto E. Reimer Co., and is similarly signed by them. If this be considered a claim, it was filed in time. The District Court has now allowed this document, which already contained a 'statement setting forth the claim, the consideration therefor, whether any, and if so what securities are held therefor, and that the sum claimed is owing from the bankrupt to the creditor,' and which is signed by the creditor, to be amended so as to conform to the requirements of the act; thus allowing the addition to it of the statement that no payments have been made thereon (a fair and natural inference from the original), and the oath of the creditor.

"Bankruptcy courts have the usual power of court of justice, upon motion and for good cause, to allow amendments. All parties were advised of the claim within the year. There is no dispute that

the amount claimed is justly owing from the bankrupt. The amendment was in furtherance of justice, and within a legitimate exercise of the power of amendment, under the authorities. In re Craft, 6 Blatchf. 177, Fed. Cas. No. 3317. In re Gallinger, Fed. Cas. No. 5202."

(3) *Necessity of Claim Being Signed by Creditor, or Stating Why An Agent Signs.*

The letter of August 28, 1920, addresses the trustee's attention thus: "Ref: Thos. Carstens' Lease." The letter shows that the writer is concerned with the particular property leased and in the obligation of the lessee to pay the annual taxes.

O. F. Kuhl, who wrote the letter, gave testimony that he looks after Mr. Carstens' private affairs, real estate deals, taxes and everything of that kind; that he saw to it that taxes are paid (Trans. p. 23), that in August, 1920, he procured statement of the 1919 taxes and by the letter of August 28, 1920, demanded that the taxes be paid. (Trans. p. 24.)

His attention was called to a controversy about the payment of the portion of the waterway assessment and the trustee's proposal to eliminate it for the taxes succeeding 1917 and 1918; he took the letter to Carstens and then Carstens made a trip to see McLean about it. (Trans. p. 25.)

This shows that Kuhl was acting as Carstens' agent in making the claim by letter of August 28, 1920. That the demand was made as the act of Carstens, though irreruglarly through an agent without the agent complying with the directions of the general order.

In *In re McCarthy Portable Elevator Co.*, 205 Fed. 986, the referee disallowed a claim of McKiernan on the ground that the proof showed that the claim was owned by one Keeney. The court held that even though this were true, that the claim could be amended so as to permit Keeney to obtain the benefit of it, and said:

"The clause requiring the proving of claims within the year, while in the nature of a limitation upon the creditors' rights, is clearly intended to facilitate the liquidation of bankrupts' estates. To administer such estates, it is needful to know the amount of the claims that are to share the assets, and the year limit for proving such claims is primarily for such purpose. That it operates to exclude claims not proven within such period is but incidental. To refuse recognition of a meritorious claim, though filed within the prescribed year, because not presented by the then owner, is not justified by the language of such clause, and to do so would be to do violence to the spirit and purpose of the enactment. In the present case the claim proved disclosed its true nature and consideration. It having been

filed within the year, it gave all the needed information to permit the carrying out of the primary purpose of the year's limitation."

In re A. J. Ellis, Inc., 252 Fed. 483, the Circuit Court of Appeals of the Third Circuit, permitted bondholders to file amended claims to the claim of the trustee for the bondholders where there was a dispute whether the corporation acting as trustee had the right to use its own name while collecting the money for the bondholders. The court quotes the language of the District Court with approval:

" 'One of the chief objects of the law regulating the administration of estates in bankruptcy is to secure a fair division thereof among creditors and if the litigation of the rights of the trustee to file proof of claim for the bondholders was a litigation within the meaning of section 57 of the Bankruptcy Act of 1898, the petitioners should be allowed to amend the proof of claim as prayed.' "

Further on in the opinion:

"The only mistake (if mistake it were) consisted in failing to set forth positively that the real creditors were themselves asserting their conceded right, and that the company was merely agent. The equities are plainly with the bondholders, and fortunately we see no reason to doubt the court's power to afford relief. If the question were before the New Jersey Court of Errors and Appeals, it seems clear that the substitution of one plaintiff for an-

other would be allowed, and we do not think the equitable power of a court of bankruptcy is more restricted. See, also, In re Roeber, 127 Fed. 122, and In re McCarty Co., 205 Fed. 986. In a word the proof as originally filed was expressly on behalf of the bondholders and asserted their rights. It may be that the company had taken too much on itself—upon that point we intimate no opinion—but in any event, as the step had been taken in good faith, and as all the facts had been clearly and seasonably stated, we think the District Court was right in allowing the real parties in interest to make the company's place on the record."

In re Standard Telephone Co., 186 Fed. 586.

The bankrupt did not owe the Carstens Packing Co. or O. F. Kuhl any amount of taxes on this property but it did owe Thos. Carstens the amount claimed. The only reasonable inference from the claim is that it is being made for Carstens benefit.

(4) *Necessity of Showing What Security Was Held.*

The statute requires a statement of what if any security is held. No one can be harmed by the filing of a claim without a statement so long as the creditor has not received a dividend upon his claim or in fact holds no security. Courts have permitted claimants that made no statement of the security and filed as unsecured claimants through error and

without fraud to amend the claim after the expiration of the year.

In re Frisk & Robinson, 185 Fed. 974, the syllabus of Judge Hand's decision on the subject is as follows:

"Where an original claim was filed against a bankrupt's estate within the time required, the referee, after the expiration of a year from adjudication, may permit an amendment of the claim before the claimant has received a dividend, so as to correct a waiver of security."

In support of this position are cited:

In re Wilder, 101 Fed. 104.
In re Myers, 99 Fed. 691.
In re Falls City Shirt Mfg. Co., 98 Fed. 592.
In re Hubbard, Fed. Cas. No. 6813.

(5) *Necessity of Statement of Title of Court or Cause.*

The letter is addressed to the proper person who was in charge of the affairs of the bankrupt and was received by him. He knew of the Carstens' lease and was paying the monthly rent reserved therein.

Judge Archbald in *In re Blue Ridge Packing Co.*, 125 Fed. 619, said:

"Objection is made to the allowance of the claims of W. M. Alexander and A. G. Helfrich because the title of the court is not given at the head of the proof in accordance with general order 21 and form No. 31. But this is a mere informality, not enough to vitiate the proof if otherwise good, as it appears to be. There are other signs of carelessness in it, but the substance is there, and I think the claim was properly received."

(6) The claim complies with the statute by being in writing. (7) It sets out the demand or claim. (8) It sets forth the consideration. (9) It states that no payments have been made, and (10) it asserts that the amount is justly due.

Had it failed to be in writing that defect could have been amended. *In re Salvator Brewing Co.*, 188 Fed. 522, 193 Fed. 989. Had it not demanded or claimed an indebtedness against the bankrupt it might not have been amendable, but if it did not evidence an intent to abandon a claim or to rely on security instead of its share of the estate it would be amendable. *In re Thompson*, 227 Fed. 981. Had it failed to state the consideration that defect could have been amended. *In re Welborne*, 266 Fed. 385, it was said:

"In the case at bar, the orderly procedure would have been to require the claimant to amend his

proof of claim to the extent necessary to conform with the Bankruptcy Act and rules: i. e., to make clear upon the face of the claim at least the nature of the agreement. As, however, the referee, in order to save time which might have been lost by an adjournment, permitted the claimant to supplement the defects of the claim, by oral testimony, this testimony will be regarded as written into the claim, and as now constituting the claimant's claim. As such the claim in accordance with settled authority "amounts to a *prima facie* case.' "

From the foregoing it is evident that great liberality exists in the matter of allowing amendments to informal claims.

This court permitted the amendment of a claim filed on an open account to change the cause to proof upon a promissory note after the year for filing claims had elapsed, in *In re Central Grain Company*, 200 Fed. 229. Pointing out that no rights of third persons were prejudiced, Judge Hunt, speaking for the court said:

"The principle of a liberal authority to amend claims in bankruptcy has found repeated approval in decisions, and where, as in this instance, there was enough in the original proof by which to amend and the District Court has approved of the amendment, an appellate court should be reluctant to disturb the ruling. In re Myers, 99 Fed. 691; In re Roeber, 127 Fed. 122; In re Kissler, 184 Fed. 51; Hutchinson v. Otis, etc. Co., 190 U. S. 552."

In *In re Jones Dry Goods Co.*, 223 Fed. 318, the Circuit Court of Appeals of the Eighth Circuit speaking of the essentials of a proof of claim, said:

"All that is required is to state that the bankrupt is indebted to the claimant in a certain amount of money, what the consideration of the debt was, and that no part of it has been paid. Referring again to the proof of claim as made out by the trust company in this case, it appears that it complied with all the provisions of the law in making its claim. It set forth the amount of its debt and alleged the consideration to have been a loan by it to the Jones Dry Goods Company of the sum of $15,000."

In *In re Thompson*, 227 Fed. 981, the Circuit Court of Appeals of the Third Circuit refused to allow an amendment to a letter from the claimant to the trustee in response to a request by him as to the amount of the debt and the amount and character of the collateral. The court said:

"Much liberality has been shown by the courts in permitting imperfect claims and proofs of claims to be put into proper form after the statutory period has expired, but we are advised of no decision that runs counter to the positive language of the act and permits a claim that is wholly new to be presented after the limitation has run. In some form the substance of a claim must have been made within the proper time, but if this had been done amendments may be made afterward. *Whether formal*

or informal, a claim must show (as the word itself implies) that a demand is made against the estate, and must show the intention to hold the estate liable."

The Honorable District Court in the present case was of opinion that the letter does not meet the requirement of section 57a or the General Orders No. 21. "It has none of the essentials required by this section, and upon its face exposes (a) a manifest purpose other than to share in the distribution of the liquidation of the assets of the estate. (b) It was to require the payment of taxes in full, or I think, the intention follows that the penalty or default for violation of the condition of the lease would be invoked." (Trans. pp. 34-35.)

We submit that the conclusion is unsound. The letter demands payment of the representative of the estate and that he make the payment on the same basis as the bankrupt had paid under the lease. It most certainly evidences an intention to require the representative to make the payment. There is no hint that the demand for the money will be abandoned.

(a) Does the letter manifest a purpose not to share in the distribution of the assets of the estate? First let us ask if a manifestation of such an in-

tent destroys the validity of a claim, and if the intention of the claimant is essential to the validity of the claim so long as there is no fraud or bad faith.

In *Bennett v. American Credit Indemnity Company*, 159 Fed. 624, a question arose as to whether a claim mailed to the referee had been received by the referee. The referee, however, had received an assignment of the claim of a creditor of the bankrupt to the American Credit Indemnity Company, from that company, and the Circuit Court of Appeals of the Sixth Circuit, as well as Judge Cochran, District Court, were of opinion that the assignment which was received by the referee was sufficient in form so that an amended claim might be filed, making it a valid claim under the Bankruptcy Act.

In this decision of course there was no intention on the part of the claimant that the assignment received by the referee should be considered as a claim, yet it did evidence the existence of an indebtedness and the ownership of a claim that had been asserted though not filed within the year.

The Circuit Court of Appeals for the Second Circuit, in the case of *In re Kessler*, 184 Fed. 51, had before it the consideration of a letter accom-

panied by an account sent to an assignee for the benefit of creditors, by a Paris creditor, before bankruptcy. A lawyer representing this creditor called upon the receiver after bankruptcy, and asked if he had received a claim from the assignee of the bankrupt. The receiver said that it was all right. The court referred to the Orcutt & Company case cited above, and held that the leaving the claim with the trustee in bankruptcy was a sufficient filing, without filing the same with the referee, and then said:

"It would be harsh and inequitable to refuse them relief upon the statement of facts above recited, if there were power to grant it. It is not disputed that the papers sent to the assignee, and by him turned over to the receiver, do not comply with the requirements of the statute; but it has been repeatedly held that 'a proof of claim' which is defective in some substantial particular may be amended, and that such amendment may be made subsequent to the expiration of one year after adjudication, although the effect of such amendment may be that 'proof of claim' is hereby effectively made only after the year limited by section 57n. The great liberality of the courts in that regard is shown by an analysis of some of the decided cases."

Several cases are then reviewed, and the court continues:

"We do not understand that the district judge refused to allow the amendment as an exercise

of discretion, but did so because he was not satisfied that the testimony showed that there had been filed within the year a written statement which contained enough by which to amend. The account and letter sent by Heine & Co., showed the details of transactions with Kessler & Co., and that the result of those transactions was that the latter firm was indebted to the former in a stated sum. We do not concur with the conclusion that it did not contain in writing any indication that it is a claim against the bankrupt estate. It was not sent until after assignment, and was expressly sent, not to Kessler & Co., but to the assignee as a claim against their estate. It did not contain any statement in reference to security, nor was it verified, nor was it in the form prescribed; but it certainly notified the assignee and—when it was by him turned over to the receiver—notified the latter that Heine & Co. claimed that the estate of Kessler & Co. owed the stated sum of money as a result of transactions therein set forth."

In the foregoing case it can hardly be contended that there existed any intention on the part of the creditor that the letter should be filed as a claim. When the creditor sent the letter, bankruptcy had not yet occurred. It was sent to representatives to be lodged with an assignee. Certainly if the mental attitude of the creditor is to determine the validity of a claim the decision of this case is wrong. But is not the decision sound? Why should the letter not be treated as an informal claim? The other

creditors have done nothing for which they should be rewarded by swelling their dividends at the expense of this creditor. The creditor, it is true has been careless, but his fault has harmed no creditor and he has been culpable of no fraud.

In *In re Fairlamb*, 199 Fed. 278, after bankruptcy, creditors considered the matter of making a settlement, and a petition was circulated in which creditors signed their names, indicating a willingness to accept a portion of their claims. This petition set up the amount of the claim, was signed by the creditor and filed by the trustee in bankruptcy with the referee, within the year. The compromise was not effected. After the year, the petitioning bank, a creditor, asked leave to amend its claim so as to have the benefit of the full indebtedness against the bankrupt. This was granted, the court saying:

"I am of the opinion that the agreement filed with the referee, signed by the bank, setting out the amount of its claim and the securities which it agreed to accept, under the circumstances of this case, was sufficient in substance to constitute an amendable claim, and that it would be inequitable to permit the petitioner to enjoy the fruits of a settlement, which could not have become effective without the bank's assent, and to largely increase its dividend by forbidding the bank to be put in the position of having its claim allowed when the peti-

tioner, together with all other creditors, was fully advised of the amount of the bank's claim."

In the foregoing case how can it be said that there was any intention on the part of the creditor that settlement agreement should be a claim on the estate. Its purpose was not a demand upon the estate but a release of demand, an assertion of a willingness to abandon a claim against the estate.

In re Salvator Brewing Co., 188 Fed. 522, was a case where directors of a corporation indorsed notes of the company that became insolvent. They were required to pay the notes and took securities which they were forced to surrender in the bankruptcy proceedings. They were permitted to file amended claims after the year based on their *oral testimony* taken before the referee on the hearing on the validity of the assignment. On the appeal in the Circuit Court of Appeals (193 Fed. 989) the court said:

"The testimony taken in proceedings before the referee presented all the facts necessary to establish Meyer's claim. This was not in the shape of a formal proof, it is true, but it can not be questioned that the records of the bankruptcy court contain proof that these directors have a valid claim against the estate. It was but a reasonable exercise of its discretion for the court to permit an amendment,

conforming the proof to the rules and practice of the court; the fact being undisputed that its own records informed the court that a perfectly valid claim existed."

Have the appellants done differently in the present case? Assuming that they were demanding full payment of the trustee, this must have been a demand for a "distribution of the liquidation of the assets of the estate," for with what other fund could the trustee make payment? The trustee had nothing else to apply upon the claim of the appellants.

(b) But has not His Honor erred in concluding that the letter was intended as a demand of full payment of the taxes or a declaration of default under the lease?

McCord's testimony is that Mr. McLean said they would soon have the money to clean the matter up; that he didn't think that the agreement of the trustee to pay the taxes had to be approved by the referee; that if the trustee took over the lease and the court recognized it and payments on the lease were made, that they would have to take it with all of the burdens. (Trans. pp. 21-22.)

Both the referee and the district judge impute an intention on the part of the appellants to declare the lease forfeited. But this shows that that was

never the intention of the appellants. They claimed that the trustee should perform the conditions of the lease and demanded that all of the payments be made from the assets of the estate. If the words of the letter could be construed on first blush as a threat of forfeiture, no forfeiture could have been enforced to the extent of summarily removing the trustee from possession of the premises.

The trustee, as pointed out in his answer to the petition of the appellants, has a reasonable time in which to dispose of the assets of the estate and can only be charged a reasonable rental for the premises in the meantime. (Trans. p. 8.) Does it lie in his mouth to say that from March, 1920 to July, 1921 is such a reasonable time and then assume that the letter of August 28, 1920, was a demand by appellants for immediate possession of the premises? If the letter was a demand and declaration of intention to forfeit the lease there was no intention of the appellants to make a gratuity of the 1919 taxes for a surrender of the possession of the property. Suppose the trustee had immediately surrendered the possession of the property to the appellants on receipt of the letter, the bankrupt would still be liable for the taxes and appellants could have shared in the estate. In other words this is not the case of

the creditor saying, "There is a debt due me, but I may avail myself of some other means of satisfaction." It is a demand that the debt be paid.

But if the creditor claims that the trustee should make a full payment of his particular debt in preference to other creditors, is it inequitable to allow his claim?

In this connection it should be noticed that both the referee and the district judge took the position that there was not the substance of a claim here to amend, and not that the appellants had not acted in good faith. The facts show that no imputation of bad faith can be made against the appellants. They were advised that if the trustee continued in possession of the premises paying the monthly rental reserved in the lease that he would thereby assume the lease with its burdens, and that they need do nothing except rely on the oral promise of the trustee to make the payments. No one questioned the obligation of the trustee to make the payments until after the year for making claims had expired. Then, when the appellants sought the relief they had been advised they were entitled to, it developed that there had been a mistake of fact or law in this; no order had been made by the referee authorizing an acceptance of the lease as an asset

of the estate. The appellants were attempting to enforce a right that did not exist. They could show no more than a continued possession by the trustee and an incompleted agreement on his part to make the payments. They could not show any approval by the court.

In re Frazin, 183 Fed. 28.

In re Dushane v. Beall, 169 U. S. 513, 16 S. Ct. R. 637.

The appellants have made a demand for the payment of the 1919 taxes, they have given the trustee the amount, and he has the terms of the lease before him because he has had the court authorize the monthly payment of rent, but the appellants have been poorly advised as to the duty of the trustee to pay this item. They have at most made a mistake of law.

In *Hutchinson v. Otis*, 115 Fed. 937, later approved in the supreme court, it was said:

"Therefore, as the record leaves the matter open, we are bound to conclude that, in all the proceedings which it is necessary for us to consider, Otis, Wilcox & Co., acted under a mistake of fact, and not a mere mistake of law, although it is settled beyond question that parties acting under a mistake of law will not necessarily be held to that mistake by a court of bankruptcy, when the result would be to do substantial injustice."

In re Myers, 99 Fed. 691, considered the right to amend a claim filed as an unsecured claim so as to permit the claimant to offset the bankrupt's bank deposit against the indebtedness due the bank. The court said:

"The court undoubtedly possesses the power, in its discretion, and in a proper case, to allow proofs of debts to be amended, and *in case of mistake or ignorance, either of fact or law, will generally exercise that power, in the absence of fraud,* and when all the parties can be placed in the same situation that they would have been in if the error had not occurred, and where justice seems to demand that the amendment should be made. This would seem to be such a case."

The majority of the cases already cited cover situations where the creditor has mistaken not only form but procedure or rights. And they evidence a purpose of the vast majority of courts to aid the claimant where no one is harmed by his conduct and a failure to aid him will work a hardship upon him.

Even where the creditor has received a voidable preference and has refused to surrender it, the courts permit him to share in the general fund when he has lost his cause.

In re Louis J. Bergdoll Motor Co., 233 Fed. 410, the court said:

"The trustee does not assert that the mere lapse of time was sufficient. It is true that more than a year had passed since the adjudication (section 57, cl.'n') ; but as the litigation about the preference was not ended until April 26, 1915, and as the proof was offered within 60 days from that date, he concedes that the offer was in time. . . . . The sole ground of the trustee's objection is that the preferential payment was a fraud in which Bergdoll himself took part, and that such conduct affords an equitable reason for denying him the right to prove. . . . . In the last analysis we are asked to punish a creditor whose debt was lawfully contracted, for the reason that he was guilty of fraud afterwards in trying to secure an advantage. . . . . Is he to be punished still further by the practical forfeiture of his debt? As it seems to us, the sufficient answer is the language of Keppel v. Bank, 197 U. S. 362, 25 Sup. Ct. R. 445: 'This would disregard the elementary rule that a penalty is not to be readily implied, and on the contrary that a person or corporation is not to be subjected to a penalty unless the words of a statute plainly impose it.' "

In re Fagan, 140 Fed. 758.

So far as the conduct of the parties can be compared, if the appellants' letter should be considered as a demand for a better share of the estate than other creditor might receive, still the principle of the preference cases clearly indicates that they have done nothing that can warrant the court in for-

feiting their lawful demand against the bankrupt estate.

The present case is a particularly harsh case against the appellants if the decision of the District Court is to stand because it will result in the use of the bankruptcy court to aid a corporate debtor to have returned to it assets that should be a trust fund for its creditors. The agreed facts in the record are "that there are sufficient funds on hand to pay the said petitioners the same percentage as has heretofore been paid other creditors, and that there is a possibility that all creditors will be paid one hundred cents on the dollar on their claims." (Tr. pp. 19-20.)

Where compositions have been made in the bankruptcy proceedings the courts have permitted most liberal amendment. *In re Aarons*, 243 Fed. 634, Judge Davis said:

"The court recognized this claim and had all the essentials thereof before it. The money with which to pay the same was deposited with the clerk of the court and is now in his hands. The bankrupt in effect says: 'True, I included this claim in my schedules, do not dispute its correctness, and agreed to pay 20 per cent thereof in cash, and in consequence had my estate returned to me; but the claimant did not prove his claim within one year, and there-

fore I should not be compelled to pay it, although I made no such condition in my offer.'

"This would be most inequitable. It would doubtless be better practice for the creditors to prove their claims, and to do so within one year; but as Judge Coxe in the case of In re Basha & Sons, 200 Fed. 951, said with reference to a creditor in a similar situation: 'Was not the bank excusable for not having filed a formal proof? We think it was, and that the court should have permitted it to be filed *nunc pro tunc*.' "

The funds are here to pay the appellants, other creditors have received large dividends and we understand that since this case was heard below, have been paid in full. The lease was not taken as an asset by the trustee so must have reverted to the bankrupt if there was any value in it, yet the appellants can not require payment of the taxes for 1919 which were clearly a claim against the estate. Such is not an equitable adjustment between the bankrupt and the appellants. Since the creditors are practically eliminated the equities between the bankrupt and the appellants are really all that should be considered.

Planters Oil Co. v. Gresham, 202 S. W. 145, on 153.

2 Remington on Bankruptcy, concludes, section 889, on amendment of claims, as follows:

"The rule (of permitting amendments to informal claims) has been so relaxed by recent decisions that it has finally come to be held in one circuit that a failure to file within the year owing to a 'pardonable mistake' will warrant the allowance of a *nunc pro tunc* order, especially where it also appears that the claim was recognized by the court and the creditors as one entitled to share in composition proceedings."

In re Coleman & Titus Corporation, 286 Fed. 303 to the same effect.

A creditor with a voidable preference is not required to file a claim within the year on the assumption that his security may be taken from him. A creditor whose claim is being liquidated by litigation does not have to commence his suit for liquidation during the year. (2 Remington on Bankruptcy, Sec. 878.) Why should a creditor who has received every indication from the trustee that he intended to assume a lease *cum onere*, be precluded from filing an amended claim where the referee refused after the year to permit the trustee to accept the lease as an asset of the estate?

In *Sessions v. Romadka*, 145 U. S. 29, 12 S. Ct. R. 799, the court refused to allow a trustee to say that he had elected to abandon property where he had done nothing to show an acceptance during the year.

The language of the decision seems applicable here:

"In this case the assignee had taken a year to wind up the estate, and had given no sign of his wish to assume this property if indeed he knew of its existence. On being asked with reference to it by the proposed purchaser, he replied that the estate was all settled up, that he had no power to do anything in the matter as that Poinier was the only one who could give title. A plainer election not to accept can hardly be imagined. Granting that up to that time he had known nothing about the happening, it was his duty to inquire into the matter if he had any thought of accepting them, and not to mislead the plaintiff's agent by referring him to the bankrupt as the proper person to apply."

In the present case it is stipulated that the trustee after the year for filing claims had elapsed represented that he would pay an amount of rent which would include payment of the 1919 taxes, that the trustee did nothing to prevent the appellant from filing a claim within the year, made no affirmative representation that the 1919 taxes would be paid as a part of the expenses of administration, nor did anything to mislead claimants or influence or induce them not to file claim, nor did they refuse to pay these taxes until after the year was up. (Trans. pp. 19-20.)

The trustee took no action except as was consistent with an acceptance of the lease *cum onere*. His

answer to appellants' petition is that he did not have to move during the year for filing claims because more than that time was necessary for him to decide whether to accept or abandon the lease. (Trans. p. 8.) Why should the appellants file a claim during the year when they had been told by the trustee that he would pay a sum sufficient to include this item of tax? In fact his position has been, now that the year has elapsed and you thought that you would receive payment of your taxes, you are without legal remedy.

Under the foregoing authorities we submit that appellants should be allowed to file an amended claim.

The District Court dismissed the suggestion that the amendment could be tendered within sixty days after the order of the referee fixing the reasonable allowance for the use of the premises, as being inconsistent with the amendment of the letter as an informal claim on the estate. (Trans. p. 33.)

We feel that any inconsistency was forced upon the appellants and not of their own choosing, and, therefore, should not prejudice their right to amend. Their position was consistent up to the time the trustee by his answer repudiated his proposal to

pay an amount of rent that would include the 1919 taxes. Then appellants were confronted with a choice either to pursuade the court to make an allowance of a reasonable rental large enough to cover the loss of the 1919 taxes or to seek to have the right to try out that proposition and if unsuccessful to have an amended claim filed to the letter of August 28, 1920.

The object of the proceedings before the referee was to determine whether the appellants were entitled to any redress on the state of facts developed. The proceedings included a matter clearly provable as a claim against the estate, if the trustee was not required to pay the item for other reasons. The proceedings were therefore for the purpose of liquidating, adjusting and determining what should be paid by the trustees to the appellants. If the trustee had accepted the lease as an asset of the estate, then no claim was necessary or proper. The proceedings were to determine the question of whether the appellants should look to the trustee or to the estate. Without enlarging the scope of the decisions applicable to section 57n of the Bankruptcy Act, the claim was proper.

We think that the following cases amply sustain the application of the principle to the present facts:

In re Roeber, 127 Fed. 122.

Buckingham v. Estes, 128 Fed. 584.

Bennett v. American Credit Indemnity Co., 159 Fed. 624.

In *In re Standard Telephone & Elec. Co.*, 186 Fed. 586, the court said:

"Worcester in his Unabridged Dictionary gives the first definition of this term (liquidate) 'To clear away, to clear or free from complication, confusion or obscurity,' and the third definition, 'To ascertain the kind and precise amount of as of damages or a debt.' To remove doubt as to the kind of a claim was as much a liquidation as to determine the exact amount thereof."

And see cases there cited.

The liquidating suit does not have to be commenced within the year for filing claims if urged in good faith.

2 Remington on Bankruptcy, Sec. 862.

We, therefore, respectfully submit that the appellants are entitled to relief on their appeal and should be permitted to file an amended claim for the 1919 taxes on the property covered by the lease.

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